

CONTRACT BETWEEN FOUNTAINWORKS, LLC AND THE CITY OF DURHAM FOR
FACILITATION AND SUPPORT FOR THE JORDAN LAKE PARTNERSHIP

This contract is made and entered into as of the ____ day of _____, 20____, by the City of Durham (“City”) and Fountainworks, LLC (“Contractor”), a limited liability company organized under the laws of North Carolina

Sec. 1. Background and Purpose. The Jordan Lake Regional Water Supply Partnership (Partnership) was formed by various local governments and water authorities and created to support a regional planning partnership and to explore joint development of a water supply intake on the western shore of Jordan Lake. The Partnership is governed by a Memorandum of Understanding (MOU) between the members and is managed by a Partnership Management Team (PMT). The PMT provides guidance to Durham in the management of the Partnership. The Contractor services will include ongoing strategic collaboration and general support for the activities of the Partnership. Each member of the Partnership has agreed to an annual payment to the City of Durham to help offset the costs of Durham’s support for the collaborative efforts of the Partnership. The purpose of this contract is to set forth the terms and conditions under which the Contractor, Fountainworks, LLC will provide professional services in support of the City of Durham’s responsibility to act as the Lead Agency for the Jordan Lake Regional Water Supply Partnership.

Sec. 2. Services and Scope to be Performed. The Contractor shall conduct facilitative and support services as outlined in Attachment A, “Description of Services”. The services shall be as directed and authorized by the Durham Project Manager, as designated by the director of the Department of Water Management. In this contract, “Work” or “Project” means the services that the Contractor is required to perform pursuant to this contract and all of the Contractor’s duties to the City that arise out of this contract.

Sec. 2a. Term and Extensions of Term. The Term of this Contract shall be from October 19, 2015 through September 30, 2016. The Contract may be extended for no more than two additional one-year periods upon written authorization of both parties, if funds remain within the amount approved herein for the Contract, upon the same terms and conditions as set forth in this Contract. The potential renewal periods are October 1, 2016 through September 30, 2017 and October 1, 2017 through September 30, 2018. The City Manager is authorized on behalf of the City to agree to such extension. This extension option does not preclude extension upon other terms or conditions or with additional compensation as may be authorized pursuant to law and City Council resolution.

Sec. 3. Complete Work without Extra Cost. Except to the extent otherwise specifically stated in this contract, the Contractor shall obtain and provide, without additional cost to the City, all labor, materials, equipment, transportation, facilities, services, permits, and licenses necessary to perform the Work.

Sec. 4. Compensation. The City shall pay the Contractor for the Work as described in Attachment B, “Compensation.” The City shall not be obligated to pay the Contractor any payments, fees, expenses, or compensation other than those authorized by this section. Compensation for Work performed will not exceed \$10,000 in any month without prior written of the City Project Manager. In addition, notwithstanding the services rendered, the total cost of Contractor’s services, including but not limited to those that might be supplied by subcontractors under this Contract, shall not exceed \$120,000 for the period specified in the Contract.

Sec. 5. Contractor’s Billings to City. The Contractor shall send invoices to the City on a monthly basis for the amounts to be paid pursuant to this contract. Each invoice shall identify the person performing the services, the billing rate of such person using the categories set forth in

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Attachment B, the date the services were performed, a description of the services performed, and such other information as may be reasonably requested by the City. Within twenty days after the City receives an invoice, the City shall send the Contractor a check in payment for all undisputed amounts contained in the invoice.

Sec. 6. Insurance. Contractor shall maintain insurance not less than the following:

Commercial General Liability, covering

- premises/operations
- products/completed operations
- broad form property damage
- explosion, collapse, and underground hazards if the hazards exist in the performance of this contract
- contractual liability
- independent contractors, if any are used in the performance of this contract
- City of Durham must be named additional insured, and an original of the endorsement to effect the coverage must be attached to the certificate (if by blanket endorsement, then agent may so indicate in the GL section of the certificate, in lieu of an original endorsement)
- combined single limit not less than \$1,000,000 per occurrence; aggregate limit not less than \$2,000,000 per year

Professional Liability, covering

- engineers (employed or engaged by Contractor)
- covering claims arising out design work, calculations and estimates, and any other professional engineering services performed in connection with this contract
- self-insured retentions/deductibles in excess of \$25,000 must be approved by City Finance Director
- coverage may be provided either by specific policy or as part of the Commercial General Liability Policy
- combined single limit not less than \$1,000,000 per occurrence; aggregate limit not less than \$2,000,000 per year;

Workers' Compensation Insurance, covering

- statutory benefits;
- covering employees; covering owners, partners, officers, and relatives (who work on this contract); if Contractor has less than 3 employees, certificate must specifically state that owners, partners, officers, employees and relatives are covered by the policy)
- employers' liability, \$1,000,000.
- Waiver of subrogation in favor of the City of Durham

Insurance shall be provided by:

- companies authorized to do business in the State of North Carolina
- companies with Best rating of A-VIII or better.

Insurance shall be evidenced by a certificate:

- providing notice to the City of not less than 30 days prior to cancellation or reduction of coverage
- certificates shall be addressed to:
City of Durham, North Carolina
Department of Water Management
attention: Vicki Westbrook
101 City Hall Plaza
Durham, NC 27701

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- both the insurance certificate and the additional insured endorsement must be originals and must be approved by the City's Finance Director before Contractor can begin any work under this contract.

Sec. 7. Performance of Work by City. The City may, in its discretion, in order to address performance issues or bring the project closer to the schedule perform or cause to be performed some or all of the Work, and doing so shall not waive any of the City's rights and remedies. Before doing so, the City shall give the Contractor notice of its intention. The Contractor shall reimburse the City for additional costs incurred by the City in exercising its right to perform or cause to be performed some or all of the Work pursuant to this section.

Sec. 8. Exhibits. The following exhibits are made a part of this contract:

Attachment A - Description of Services containing 2 pages.

Attachment B – Compensation containing 1 page.

In case of conflict between an exhibit and the text of this contract excluding the exhibit, the text of this contract shall control.

Sec. 9. Termination for Convenience ("TFC"). (a) *Procedure*. Without limiting any party's right to terminate for breach, the City may, without cause, and in its discretion, terminate this contract for convenience by giving the Contractor written notice that refers to this section. TFC shall be effective at the time indicated in the notice. The City Manager may terminate under this section without City Council action. (b) *Obligations*. Upon TFC, all obligations that are still executory on both sides are discharged except that any right based on prior breach or performance survives, and the indemnification provisions and the section of this contract titled Trade Secrets and Confidentiality shall remain in force. At the time of TFC or as soon afterwards as is practical, the Contractor shall give the City all Work, including partly completed Work. In case of TFC, the Contractor shall follow the City's instructions as to which subcontracts to terminate. (c) *Payment*. The City shall pay the Contractor an equitable amount for the costs and charges that accrue to Contractor because of the City's decisions with respect to any subcontracts, but excluding profit for the Contractor. With regard to Contractor's own services, within 20 days of final billing by the Contractor, the City shall pay the Contractor a one hundred dollar TFC fee and for all Work performed by Contractor consistent with the provisions of this Contract, except to the extent previously paid for. Work shall be paid for in accordance with the method (unit prices, hourly fees, etc.) to be used for payment under this Contract. If Work was to be paid for on a lump-sum basis, the City shall pay the part of the lump sum that reflects the percentage of completion attained for that Work. The Contractor shall not be entitled to any payment except as stated in this section because of TFC, whether on the basis of overhead, profit, damages, other economic loss, or otherwise.

Sec. 10. Notice. (a) All notices and other communications required or permitted by this contract shall be in writing and shall be given either by personal delivery, fax, or certified United States mail, return receipt requested, addressed as follows:

To the City:

Donald F. Greeley, Director or
Vicki P. Westbrook, Assistant Director
City of Durham
101 City Hall Plaza
Durham, NC 27701
The fax number is (919) 560-4479

To the Contractor:

Warren Miller, Partner
Fountainworks, LLC

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PO Box 28142
Raleigh, NC 27611
The fax number is (919) 833-8177

(b) Change of Address. Date Notice Deemed Given. A change of address, fax number, or person to receive notice may be made by either party by notice given to the other party. Any notice or other communication under this contract shall be deemed given at the time of actual delivery, if it is personally delivered or sent by fax. If the notice or other communication is sent by United States mail, it shall be deemed given upon the third calendar day following the day on which such notice or other communication is deposited with the United States Postal Service or upon actual delivery, whichever first occurs.

Sec. 11. Trade Secrets and Confidentiality. The request for proposals section titled "Trade Secrets and Confidentiality" shall apply to any Trade Secrets disclosed to the City during the process leading to the parties' entering into this Contract (including all of the Contractor's responses to the RFP). This section shall remain in force despite termination of this contract (whether by expiration of the term or otherwise) and termination of the services of the Contractor under this contract. The word "Proposer" used in that section shall mean the "Contractor."

Sec. 12. Indemnification. (a) To the maximum extent allowed by law, the Contractor shall defend, indemnify, and save harmless Indemnitees from and against all Charges that arise in any manner from, in connection with, or out of this contract as a result of acts or omissions of the Contractor or subcontractors or anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable. In performing its duties under this subsection "a," the Contractor shall at its sole expense defend Indemnitees with legal counsel reasonably acceptable to City. (b) Definitions. As used in subsections "a" above and "c" below -- "Charges" means claims, judgments, costs, damages, losses, demands, liabilities, duties, obligations, fines, penalties, royalties, settlements, and expenses (included without limitation within "Charges" are (1) interest and reasonable attorneys' fees assessed as part of any such item, and (2) amounts for alleged violations of sedimentation pollution, erosion control, pollution, or other environmental laws, regulations, ordinances, rules, or orders -- including but not limited to any such alleged violation that arises out of the handling, transportation, deposit, or delivery of the items that are the subject of this contract). "Indemnitees" means City and its officers, officials, independent contractors, agents, and employees, excluding the Contractor (c) Other Provisions Separate. Nothing in this section shall affect any warranties in favor of the City that are otherwise provided in or arise out of this contract. This section is in addition to and shall be construed separately from any other indemnification provisions that may be in this contract. (d) Survival. This section shall remain in force despite termination of this contract (whether by expiration of the term or otherwise) and termination of the services of the Contractor under this contract. (e) Limitations of the Contractor's Obligation. If this section is in, or is in connection with, a contract relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, then subsection "a" above shall not require the Contractor to indemnify or hold harmless Indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of Indemnitees.

Sec. 13. Miscellaneous

(a) Choice of Law and Forum. This contract shall be deemed made in Durham County, North Carolina. This contract shall be governed by and construed in accordance with the law of North Carolina. The exclusive forum and venue for all actions arising out of this contract shall be the North Carolina General Court of Justice, in Durham County.

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Such actions shall neither be commenced in nor removed to federal court. This section shall not apply to subsequent actions to enforce a judgment entered in actions heard pursuant to this section.

(b) Waiver. No action or failure to act by the City shall constitute a waiver of any of its rights or remedies that arise out of this contract, nor shall such action or failure to act constitute approval of or acquiescence in a breach thereunder, except as may be specifically agreed in writing.

(c) Performance of Government Functions. Nothing contained in this contract shall be deemed or construed so as to in any way estop, limit, or impair the City from exercising or performing any regulatory, policing, legislative, governmental, or other powers or functions.

(d) Severability. If any provision of this contract shall be unenforceable, the remainder of this contract shall be enforceable to the extent permitted by law.

(e) Assignment. Successors and Assigns. Without the City's written consent, the Contractor shall not assign (which includes to delegate) any of its rights (including the right to payment) or duties that arise out of this contract. The City Manager may consent to an assignment without action by the City Council. Unless the City otherwise agrees in writing, the Contractor and all assignees shall be subject to all of the City's defenses and shall be liable for all of the Contractor's duties that arise out of this contract and all of the City's claims that arise out of this contract. Without granting the Contractor the right to assign, it is agreed that the duties of the Contractor that arise out of this contract shall be binding upon it and its heirs, personal representatives, successors, and assigns.

(f) Compliance with Law. In performing all of the Work, the Contractor shall comply with all applicable law.

(g) City Policy. THE CITY OPPOSES DISCRIMINATION ON THE BASIS OF RACE AND SEX AND URGES ALL OF ITS CONTRACTORS TO PROVIDE A FAIR OPPORTUNITY FOR MINORITIES AND WOMEN TO PARTICIPATE IN THEIR WORK FORCE AND AS SUBCONTRACTORS AND VENDORS UNDER CITY CONTRACTS.

(h) EEO Provisions. During the performance of this Contract the Contractor agrees as follows: (1) The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. The Contractor shall take affirmative action to insure that applicants are employed and that employees are treated equally during employment, without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. Such action shall include but not be limited to the following: employment, upgrading, demotion, transfer, recruitment or advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The Contractor shall post in conspicuous places, available to employees and applicants for employment, notices setting forth these EEO provisions. (2) The Contractor shall in all solicitations or advertisement for employees placed by or on behalf of the Contractor; state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, political affiliation or belief, age, or handicap. (3) The Contractor shall send a copy of the EEO provisions to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding. (4) In the event of the Contractor's noncompliance with these EEO provisions, the City may cancel, terminate, or suspend this contract, in whole or in part, and the City may declare the Contractor ineligible for further City contracts. (5) Unless

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exempted by the City Council of the City of Durham, the Contractor shall include these EEO provisions in every purchase order for goods to be used in performing this contract and in every subcontract related to this contract so that these EEO provisions will be binding upon such subcontractors and vendors.

(i) SDBE. The Contractor shall comply with all applicable provisions of Chapter 26 of the Durham City Code (Equal Business Opportunities Ordinance), as amended from time to time. The failure of the Contractor to comply with that chapter shall be a material breach of contract which may result in the rescission or termination of this contract and/or other appropriate remedies in accordance with the provisions of that chapter, this contract, and State law. The Participation Plan submitted in accordance with that chapter is binding on the Contractor. Section 26-10(f) of that chapter provides, in part, "If the City Manager determines that the Contractor has failed to comply with the provisions of the Contract, the City Manager shall notify the Contractor in writing of the deficiencies. The Contractor shall have 14 days, or such time as specified in the Contract, to cure the deficiencies or establish that there are no deficiencies." It is stipulated and agreed that those two quoted sentences apply only to the Contractor's alleged violations of its obligations under Chapter 26 and not to the Contractor's alleged violations of other obligations.

(j) Prompt Payment to Subcontractors. Within 7 days of receipt by the Contractor of each payment from the City under this contract, the Contractor shall pay all subcontractors (which term includes sub Contractors and suppliers) based on work completed or service provided under the subcontract. Should any payment to the subcontractor be delayed by more than 7 days after receipt of payment by the Contractor from the City under this contract, the Contractor shall pay the subcontractor interest, beginning on the 8th day, at the rate of 1% per month or fraction thereof on such unpaid balance as may be due. By appropriate litigation, Subcontractors shall have the right to enforce this subsection (a) directly against the Contractor, but not against the City of Durham. If the City's Project Manager determines that it is appropriate to enforce this subsection (a), the City of Durham may withhold the sums estimated by the Project Manager to be sufficient to pay this interest from progress or final payments to the Contractor. (b) Nothing in this section shall prevent the Contractor at the time of invoicing, application, and certification to the City from withholding invoicing, application, and certification to the City for payment to the subcontractor for unsatisfactory job progress; defective goods, services, or construction not remedied; disputed work; third-party claims filed or reasonable evidence that such a claim will be filed; failure of the subcontractor to make timely payments for labor, equipment, and materials; damage to the Contractor or another subcontractor; reasonable evidence that the subcontract cannot be completed for the unpaid balance of the subcontract sum; or a reasonable amount for retainage not to exceed 10%. (c) The City's Project Manager may require, as a prerequisite to making progress or final payments, that the Contractor provide statements from any subcontractors designated by the Project Manager regarding the status of their accounts with the Contractor. The statements shall be in such format as the Project Manager reasonably requires, including notarization if so specified.

(k) No Third Party Rights Created. This contract is intended for the benefit of the City and the Contractor and not any other person.

(l) Principles of Interpretation and Definitions. In this contract, unless the context requires otherwise: (1) The singular includes the plural and the plural the singular. The pronouns "it" and "its" include the masculine and feminine. References to statutes or regulations include all statutory or regulatory provisions consolidating,

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amending, or replacing the statute or regulation. References to contracts and agreements shall be deemed to include all amendments to them. The words "include," "including," etc. mean include, including, etc. without limitation. (2) References to a "Section" or "section" shall mean a section of this contract. (3) "Contract" and "Agreement," whether or not capitalized, refer to this instrument. (4) Titles of sections, paragraphs, and articles are for convenience only, and shall not be construed to affect the meaning of this contract. (5) "Duties" includes obligations. (6) The word "person" includes natural persons, firms, companies, associations, partnerships, trusts, corporations, governmental agencies and units, and other legal entities. (7) The word "shall" is mandatory. (8) The word "day" means calendar day.

(m) Modifications. Entire Agreement. A modification of this contract is not valid unless signed by both parties and otherwise in accordance with requirements of law. Further, a modification is not enforceable against the City unless the City Manager or a deputy or assistant City Manager signs it for the City. This contract contains the entire agreement between the parties pertaining to the subject matter of this contract. With respect to that subject matter, there are no promises, agreements, conditions, inducements, warranties, or understandings, written or oral, expressed or implied, between the parties, other than as set forth or referenced in this contract.

IN WITNESS WHEREOF, the City and the Contractor have caused this contract to be executed under seal themselves or by their respective duly authorized agents or officers.

FOUNTAIN WORKS, LLC

By: _____ (SEAL)
Manager

State of _____ ACKNOWLEDGMENT BY LIMITED LIABILITY
COMPANY (Manager of LLC to sign)

County of _____

I, a notary public in and for said county and state, certify that
_____ personally (1) appeared before me this day, (2)
stated that he or she is a manager of _____ [City staff – Insert the name of
the Contractor here], a limited liability company organized and existing under the laws of the
State of _____, and that if he or she is a manager of the
company automatically by reason of being a member of the company, the operating agreement
does not change that status, (3) acknowledged that the foregoing contract with the City of
Durham carries on the company's business in the usual way, and (4) acknowledged the due
execution, under seal, of the contract on behalf of the company. This the _____ day of

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_____, 20____.

My commission expires:

Notary Public

CITY OF DURHAM

ATTEST:

By: _____

Preaudit certificate, if applicable _____